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N THE SUPREME COURT OF THE UNITED STATES.

October Term, 1927.

No. 942

ISOM GRAYSON, *ET AL., Plaintiffs in Error,*

vs.

JAMES A. HARRIS, *ET AL., Defendants in Error.*

MOTION BY DEFENDANTS IN ERROR TO DISMISS.

And now come defendants in error in the above entitled cause by their counsel, Robert F. Blair, and represent to the court:

(1) That the writ of error or appeal has been improvidently allowed; this case may not be brought to this court by appeal or writ of error but only by petition for *certiorari.*

(2) That there is no federal question in this case, or any question of importance to the public, but only the question of limitation, which is local and non-federal.

(3) That if this case is rightfully here, which is not admitted but denied, the decision of the question of limita-

tion by the Supreme Court of Oklahoma is in harmony with the decisions of that court and this court, and was and is substantially and legally correct and right.

Wherefore defendants in error move the court to dismiss the writ of error and appeal.

ROBERT F. BLAIR,
Counsel for Defendants in Error.

BRIEF.

First Point.

In *Longest* v. *Langford*, 274 U. S. 499, this court said, "This case does not involve any constitutional question, but only a question of the construction and application of congressional enactments concededly valid. It therefore falls within the class where a review in this court may be had only on petition for *certiorari*."

That declaration is applicable, for this case never could have been brought here on writ of error but only by *certiorari*, and the Act of January 31, 1928, made no change in that method of appeal from state courts.

Second Point.

We direct the attention of the court to what this court said about this identical question when this case was here before:

> "Nor need we inquire into the defense of the statute of limitations. The decision now under review entirely ignores it. The rule that when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not."
>
> —*Grayson* v. *Harris*, 267 U. S. 352.

If limitation was non-federal then, it is non-federal now.

Third Point.

The decision of the question of limitation by the Supreme Court of Oklahoma in this case is in harmony with former decisions of the question of that court, and also in harmony with the decisions of this court. The only ground for controversy is to misunderstand the facts and the condition of the pleadings. Applied to the facts, this principle is an elementary proposition.

The petition filed in the trial court by plaintiffs in error on August 4, 1917, for the recovery of this property, which they claimed to have inherited from Gertrude Grayson on her death in April, 1907, showed on its face that their action was barred by the seven-year statute of limitation in force then, and controlling. Defendants in error pleaded that statute which is section 4471 of Mansfield's Digest of the Statutes of Arkansas, as follows:

> "No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed. *Provided*, that if any person or persons that are or shall be entitled to commence and prosecute such suit or action in law or equity be or shall be at the time said right or title first accrued, come or fallen within the age of twenty-one years, *femme covert* or *non compos mentis*, that such

person or persons, his, her, or their heirs, shall and may, notwithstanding said seven years may have expired, bring his or her suit or action, so as such infant, *femme covert* or *non compos mentis*, his, her or their heirs, shall bring the same within three years next after full age, discoverture or coming of sound mind. *Provided*, also, that no cumulative disability shall prevent the bar hereby formed and constituted by the saving of this section."

It then became the duty of counsel for plaintiffs in error, in their reply, or by amended petition, to specially plead and state facts to toll the statute or bring their case within one of its exceptions, namely, minority, coverture, or incompetency, and this they wholly failed to do. Their reply in legal effect was merely a general denied (R. ..) which is not sufficient. The motion of defendants in error for judgment on the pleadings should have been sustained, but was erroneously denied. Upon this condition of the record the Supreme Court of Oklahoma held:

> "If more than seven years after acquiring title such person or his or her heirs, bring an action either in law or equity to recover said lands, and the statute of limitation is plead as a bar of the right of action, the burden of proof rests upon the plaintiffs to show facts that take it out of the bar of the statute."

This has been, and is the law of this case. It is not necessary but we nevertheless direct the attention of the court to the following authorities:

In *Miller* v. *McIntyre*, 6 Pet. 61, it was held that where defendant relies on the statute of limitation and plaintiff desires to bring himself within its savings, "it would be

proper for him, in his replication or by amendment to his bill, *to set forth the facts specially.*"

In *Marsteller* v. *McClean*, 7 Cranch. 156, this court held:

> "It is certainly a rule of pleading that a replication should of itself contain a full and complete answer to the bar, and that a joint plea which is bad, affects with its consequences all the parties joining in it."

See, also:

Taylor v. *Bonham*, 5 How. 233;
Gross v. *Disney*, 95 Tenn. 592, 32 S. W. 632;
Arnold v. *Limberger*, (Ga.) 49 S. E. 812;
Rowe v. *McIntosh*, 101 Okl. 299;
Harris v. *Grayson*, 90 Okl. 147;
Foreman v. *Marks*, 87 Okl. 205;
Maine v. *Edmonds*, 58 Okl. 645;
Patterson v. *Rousney*, 58 Okl. 185.

It is in harmony with the decisions of the Supreme Court of Arkansas whence the statute came.

In *Ouachita County* v. *Tufts*, 43 Ark. 139, it was held that when the statute of limitation is pleaded by defendant, the burden is on plaintiff to plead by replication and prove "both a cause of action and the commencement of legal proceedings within the period mentioned in the statute." The court cited *Taylor* v. *Spears*, 6 Ark. 382, and *McNeil* v. *Garland*, 27 Ark. 343.

The authorities hold that after defendants in error had pleaded the statute of seven years' limitation in answer to their petition for the recovery of this land filed ten years after their title and cause of action had accrued to them as

claimed by them in said petition, they are barred unless they plead and prove some disability in plaintiffs in error which would toll the statute and excuse them from bringing their suit within the seven-year period of limitation.

The decision here turns on the condition of the pleadings, which are shown in the appendix to this motion, and not on the question of adverse possession. That question is not raised in their pleadings, and therefore this case is not ruled by *Joines* v. *Patterson*, 274 U. S. 544.

Respectfully submitted,

ROBERT F. BLAIR,
Counsel for Defendants in Error.

APPENDIX TO MOTION OF DEFENDANTS IN ERROR TO DISMISS.

Extracts From the Transcript of Record.

The original petition of plaintiffs in error, filed in the District Court of Creek County, Oklahoma, August 4, 1917:

PETITION.

FIRST.

The plaintiffs state that they and each of them, are citizens of the Creek Nation and members of the Creek Tribe of Indians; that they are the owners in fee, each, of an undivided interest and portion of the lands hereinafter described, in the proportions hereinafter set forth, and that they derived their title thereto as hereinafter stated, to-wit:

The plaintiffs state that Nancy Colbert, deceased, was a Creek Freedman, a citizen of the Creek Nation, and duly enrolled as such on the Approved Creek Freedman roll under No. 5641; that Louisa Colbert deceased, was a Creek Freedman, a citizen of the Creek Nation and duly enrolled as such on the Approved Creek Freedman roll under No. 5639; that Garfield Colbert deceased, was a Creek Freedman, a citizen of the Creek Nation, and duly enrolled as such on the Approved Creek Freedman roll under No. 5640; that Gertrude Grayson, deceased, was a Creek Freedman, a citizen of the Creek Nation, and duly enrolled as such, on the Approved Creek Freedman roll under No. 5684; that Jim Colbert is a Creek Freedman, a citizen of the Creek Nation and duly enrolled as such on said roll under No. 2645.

The plaintiffs further state that the said Nancy Colbert, died intestate, without issue and never having

been married, about March 1st, 1900, leaving her surviving, Jim Colbert, her father, and the said Louisa Colbert, since deceased, her mother; that the said Louisa Colbert died intestate about March 7th, 1900, leaving her surviving Jim Colbert, her husband, Garfield Colbert, since deceased, her son, and the said Gertrude Grayson, since deceased, her daughter, and no other descendants.

That the said Garfield Colbert died intestate, without issue and never having been married, in the month of June, 1900, leaving him surviving Jim Colbert, his father, and the said Gertrude Grayson, since deceased, his half-sister, and no other brothers or sisters nor children of deceased brothers and sisters.

The plaintiffs further state that on the 9th day of July, 1906, there was allotted by the Commission to the Five Civilized Tribes in the name of Nancy Colbert to her Creek heirs, as the proportional share of the lands of the Creek Nation to which she would have been entitled if living, the following described lands, to-wit:

Lot Two, and the Northeast Quarter of the Northeast Quarter, and the Northwest Quarter of the Northwest Quarter of the Southeast Quarter of the Northeast Quarter of Section Thirty-one in Township Seventeen North, of Range Twelve East, and the Northwest Quarter of the Southwest Quarter of Section Seventeen, and the East Half of the Southeast Quarter of the Southeast Quarter, and the Northwest Quarter of the Southeast Quarter of the Southeast Quarter and the East Half of the Southwest Quarter of Southeast Quarter of the Southeast Quarter, and the Northwest Quarter of the Southwest Quarter of the Southeast Quarter of the Southeast Quarter of Section Twenty, all in Township Eighteen North, of Range Twelve East, and all in Creek County, Oklahoma. A copy of

the certificate of which allotment is hereto attached marked "Exhibit A" and made a part hereof.

That on the 9th day of July, 1906, there was allotted by the Commission to the Five Civilized Tribes in the name of Garfield Colbert, to his Creek heirs, as the proportional share of the lands of the Creek Nation to which he would have been entitled if living the following described lands, to-wit:

The Southwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of Section Twenty-nine, and the North Half of the Northeast Quarter of Section Thirty, all in Township Eighteen North, of Range Twelve East, in Creek County, Okla. A copy of the certificate of which allotment is hereto attached, marked "Exhibit B," and made a part hereof.

The plaintiffs further state that upon the allotment of the above described lands the said Gertrude Grayson, since deceased, and Jim Colbert, as the only surviving Creek heirs at law of the said Nancy Colbert and Garfield Colbert, became the owners in fee, each, of an undivided one-half of said allotments of lands, and became vested of the full legal and equitable title thereto as tenants in common.

The plaintiffs further state that the said Gertrude Grayson, deceased, was the illegitimate daughter of the said Louisa Colbert, deceased, her putative father being John Foster, a non-citizen of the Creek Nation and not a Creek descendant. That George Tobler, deceased, was the father of the said Louisa Colbert, deceased, and that Cloria Grayson, also known as Cloria Ross, is the mother of said Louisa Colbert; that the said George Tobler was a Creek Freedman and a citizen of the Creek Nation; that the said Cloria Grayson is a non-citizen of the Creek Nation and is not a Creek descendant.

The plaintiff further states that the said George Tobler died about the year 1890, leaving him surviving his daughter Louisa Colbert, and his wife Cloria Grayson herein before mentioned, and no other descandants nor father or mother. That the said George Tobler had the following brothers and sisters, namely: Micy Keys Bucher Grayson, Friday Tobler, Easy Rowe, Phoebe Stephens, Mimmie Grayson, Hannah Grayson, Sampson Stidham. Jim Boy Tobler and Dinah Grayson all of whom are Creek citizens and members of the Creek Tribe of Indians, and all of whom are now dead except Micy Keys, that all of the said deceased brothers and sisters of the said George Tobler left surviving them Creek descendants who are hereinafter named and are all related to them and to the said George Tobler as hereinafter set forth.

The plaintiffs further state that the said Gertrude Grayson died, intestate, without issue and never having been married on the .. day of April, 1907, in which is now Mayes County, Okla., possessed in fee of an undivided one-half of the lands hereinbefore described and leaving her surviving as her only Creek heirs at law, the said Micy Keys and the persons hereinafter named as the surviving descendants of the above named deceased brothers and sisters of the said George Tobler, deceased, and that upon the death of the said Gertrude Grayson as her Creek heir at law, the said Micy Keys and the surviving descendants hereinafter named of the brothers and sisters of the said George Tobler, deceased, became the owners in fee of the lands by her possessed as hereinbefore set forth.

The plaintiffs further state that the undivided one-half of the land above described of which the said Gertrude Grayson died possessed as hereinbefore set forth upon her death became vested in fee in the surviving

Creek heirs of the said Gertrude Grayson in the proportions and parts hereinafter set forth.

* * * * * * *

The plaintiffs further state that they are entitled to the immediate possession of the land herein described as tenants in common with each other, and the defendants herein; that the defendants, James A. Harris, William H. Harris, James H. Kennedy, Quaker Oil & Gas Company, James Brann and Dickson Q. Brown, are in possession of said lands claiming to be the owners thereof to the exclusion of the plaintiffs, in and to said lands and every part thereof; that the possession of said defendants of the said lands to the exclusion of the plaintiffs is wrongful and unlawful and that they, the said defendants, James A. Harris, William H. Harris, James H. Kennedy, Quaker Oil & Gas Company, James Brann, and Dickson Q. Brown, wrongfully and unlawfully keep the plaintiffs, each and all of them, out of the possession of said lands and every part thereof.

* * * * * * *

Wherefore, the plaintiffs pray judgment against the defendants for restitution and possession of their undivided portions and interests in said lands as set forth and alleged herein, the plaintiffs further pray an order of this court requiring the defendants to answer and set forth the nature and extent of their respective title and interest in the lands herein described.

* * * * * * *

SEPARATE ANSWER OF DEFENDANTS, WILLIAM H. HARRIS AND JAMES A. HARRIS.

And now come defendants, William H. Harris and James A. Harris, and for their answer to plaintiffs' petition filed herein, deny each and every allegation therein contained and say the same are not true in manner and form as therein alleged and set forth.

* * * * * * *

And for their further answer to plaintiff's petition these defendants aver that they and those under whom they claim, and their co-tenants, have been in open, notorious, adverse, uninterrupted and exclusive possession of all of said lands, using and occupying same from the year 1906 until the present time, having excluded plaintiffs and all of them therefrom, and having denied them all right to said property or any part thereof for more than ten years next before the bringing of said action by plaintiffs, and therefore these defendants plead the statute of ten years' limitation and the statute of seven-year limitation, and the statute of five-year limitation, and say that plaintiffs' cause of action, if any they ever had, has been and is forever barred.

* * * * * * *

Wherefore, these defendants pray that plaintiffs take nothing by their suit and that judgment be entered herein quieting the title of said property in defendants, and that plaintiffs and all of them be enjoined from ever hereafter setting up any right, title or claim to said property or any part thereof, or from interfering with these defendants in the peaceable possession and enjoyment thereof. Defendants further pray for all costs and general relief.

Robert F. Blair,
George S. Ramey,
Attorneys for Defendants.

REPLY.

Come now the plaintiffs in the above entitled action and for reply to the answer of the defendants, William H. Harris and James A. Harris, filed herein, deny each and every allegation of new matter therein contained, except such as are herein specifically admitted.

For further reply the plaintiffs state that neither Cloria Grayson nor Armstead Foster have and never had any right, title or interest in and to the lands in controversy herein, and that the deeds of conveyance by them made, described in defendants' answer and under which the defendants claim title to said land, are each and all of them void for that the said Cloria Grayson and Armstead Foster had no right, title or interest in said land and have never acquired any interest or title therein. That the deeds from L. A. Bell and H. Anna Bell, his wife, to the defendants, William H. Harris and James A. Harris, described in defendants' answer and under which they claim title through the said L. A. Bell are void for that the said L. A. Bell and H. Anna Bell had and never have had any right, title or interest in and to said land.

The plaintiffs further state that the deed described in defendants' answer as having been dated January 2nd, 1908, and made and executed by Micy Keys, *nee* Tobler, who is also known as Nicey Keys, and Jim Tobler to Cloria Grayson is not the deed of the said Micy Keys and Jim Tobler, nor either of them.

The plaintiffs further state that the tax deed mentioned in defendants' answer, made and executed by J. E. Bruin, County Treasurer of Creek County, Oklahoma, to Ira J. Anderson is based upon a purported sale of the land described in said deed for taxes assessed and levied against said land for the year 1913.

That the said tax deed is void for that it was made and issued without authority of law, without right and contrary to law, in this that the land described in said deed was not listed and assessed for taxation for the year 1913 as prescribed and directed by law and that said assessment was erroneous and illegal, and for that the county treasurer failed and neglected to give notice as required by law for the amount of taxes assessed and levied against said land for the year 1913, and when the same became due and delinquent; and for that the taxes for the year 1913 levied and assessed against said land had not become delinquent at the time of the purported sale thereof for said taxes and that said land was not subject to sale for delinquent taxes at the time said sale was held and purported to be made, and that said sale was in all things illegal and void; and for that the sale of said land for taxes of 1913 was not made as required by law; and for that the return of said sale was not made to the county clerk and that a record thereof was not kept as required by law.

The plaintiff further states that the deed described and mentioned in defendants' answer from Ira J. Anderson, dated 1917, to the defendants and others is void for that the said Ira J. Anderson had and never has had any right, title or interest in and to said lands.

The plaintiff hereby offer to pay to the defendants all taxes, penalties, interests and costs which they would be bound to pay if they were redeeming the land herein described from the purported tax sale, and hereby offer to pay to the defendants such other and further sum as the court may find just and equitable to reimburse the defendants for all moneys paid out and expended by them for or on account of taxes, penalties, costs and interest thereon assessed and levied against said land.

Wherefore, in addition to the prayer of their petition, the plaintiffs pray that the deeds described and mentioned in the answer of the defendants be declared void, that they be canceled, set aside and held for naught.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1927.

No. 942

ISOM GRAYSON, *ET AL., Plaintiffs in Error,*

vs.

JAMES A. HARRIS, *ET AL., Defendants in Error.*

NOTICE OF MOTION TO DISMISS.

Hon. Robert M. Rainey, counsel for plaintiffs in error, will take notice that on October 1, 1928, the motion of defendants in error to dismiss the writ of error and appeal, in the above entitled cause will be submitted to the Supreme Court of the United States. A printed copy thereof with brief and appendix is herewith served on you, this .... day of September, 1928.

....

Counsel for Defendants in Error.

Service accepted this .... day of September, 1928.

.....,

Counsel for Plaintiffs in Error.